

LOWENSTEIN SANDLER PC CLIENT ALERT

INVESTMENT MANAGEMENT

ATTORNEY ADVERTISING

SEC REDESIGNS FORM ADV, PART 2: EXPANDED, NARRATIVE-STYLE DISCLOSURE WILL BE PUBLICLY AVAILABLE ON SEC WEBSITE

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On July 28, 2010, the Securities and Exchange Commission (the "SEC") released final amendments to Part 2 of Form ADV ("Part 2 of Form ADV" or the "Brochure"), the principal disclosure document that federally registered investment advisers must provide to their clients and prospective clients.¹ The long-anticipated amendments followed a period of commentary on a proposed rule and form amendment release that was published by the SEC in March 2008.² Among other changes, the Brochure amendments mandate expanded Brochure content presented in a plain English narrative, electronic filing to permit public review and comparison of Brochures on the SEC website, and delivery of "Brochure supplements" containing resume-like information regarding advisory personnel providing services to clients. This client alert provides a brief overview of the existing Brochure requirements and details the Brochure requirements under the new regime, which becomes effective

60 days after publication in the Federal Register.

According to SEC Chairman Mary Schapiro, the new rules are designed to "provide clients with greater information about the individuals who will provide them with investment advice...[and] help advisers move past the check-the-box, fill-in-the-blank approach and will transform the brochure into a plain English narrative that is well-suited to serve investors' needs—a narrative that will describe the adviser's conflicts, compensation, business activities, and disciplinary history."³ Chairman Schapiro also expressed her hope that the enhanced disclosure requirements "may result in advisers modifying business practices and compensation policies which might pose conflicts, in ways that better serve the interests of clients."⁴

Current Brochure Requirements

Pursuant to the current Brochure rules and forms, investment advisers are required to respond to a series of multiple choice and fill-in-the-blank questions, supplemented with occasional narrative descriptions expanding upon responses to select questions. With the adoption of the amendments, the SEC has formally determined that this

"check-the-box" format does not allow clients and prospective clients to sufficiently understand an adviser's business practices and investment strategies, and evaluate the associated risks and conflicts. Also, prior to the adoption of the amendments, advisers had not been required to file Part 2 of Form ADV on the Investment Adviser Registration Depository system ("IARD"), and therefore, Brochures generally are not and have not been publicly available and conveniently accessible.

Amended Brochure Format and Expanded Brochure Content

The new Brochure requirements are designed to provide clients and prospective clients with "clear disclosure that they are likely to read and understand."⁵ Under the new rules, Brochures must be clearly written in plain English in a narrative format intended to provide "meaningful current disclosure."⁶ "Plain English" is generally understood to mean language that is designed to facilitate effective communication, and narrative that

avoids legal jargon, highly technical terms and multiple negatives.

Under the new rules, responses to Brochure items must be presented in the order that the items appear in the form, identified by the caption headings designated in the form. (While the 2008 proposing release had contemplated that the items could be presented in *any* order, the SEC determined in the final rule that a specified order of presentation would facilitate investors' evaluation of various Brochures and advisers.)

The New Form

Amended Part 2A of the Brochure contains 18 substantive disclosure items for federally registered advisers, and 19 substantive disclosure items for state registered advisers. In some cases, the new disclosures resemble existing requirements, while other disclosures expand significantly upon the currently required content, as described in greater detail below:

Item 1. Cover Page. Item 1 requires that the adviser disclose on the cover page of the Brochure the name of the adviser's firm, its business address, contact details, website (if any) and the date of the Brochure. The cover page must also state that the Brochure has not been approved by the SEC or any state securities regulator and, if the adviser refers to itself as a "registered investment adviser," the adviser must include a disclaimer that registration does not imply a certain level of skill or training.

Item 2. Material Changes. Item 2 requires that an adviser amending its Brochure identify and discuss any material changes since the last annual update, either on the cover page, the

page following the cover page or in a separate document delivered with the Brochure. This requirement is intended to focus clients on recent changes in the adviser's policies, practices and conflicts that may be of importance to the clients. If delivered as a separate document, the summary will be required to be filed with the SEC as a Brochure exhibit. This separate summary document may also be used to satisfy the annual client delivery obligation (discussed in further detail below). The SEC cautions that the "summary" requirement should focus on material changes and does not warrant and should not reflect a lengthy reiteration of the full Brochure content.

Item 3. Table of Contents. Item 3 requires the adviser to include in its Brochure a table of contents that permits easy identification of disclosure items, containing the same headings as set forth in the form. As discussed above, advisers are required to respond to each item in the order listed in the form, in order to allow investors to compare and evaluate disclosures regarding, among other things, the business practices, conflicts and fee arrangements of various advisers.

Item 4. Advisory Business. Item 4 requires the adviser to provide a description of its advisory business including the types of services offered, representations as to areas of specialization, and amount of client assets under management (with separate figures for discretionary and non-discretionary assets under management).⁷ In response to comments opposing the requirement regarding disclosure relating to the identification of a "specialized advisory service," the SEC states in the adopting release that such disclosure is appropriate because "clients likely will want to understand this before

engaging [the] adviser."⁸

Item 5. Fees and Compensation. Item 5 requires the adviser to describe in reasonable detail its compensation practices, provide a fee schedule, and disclose whether fees are negotiable. In response to comments, the SEC established an exception to the final rule, which permits SEC-registered advisers to omit the disclosures described in the preceding sentence from Brochures delivered *only to qualified purchasers*. Irrespective of this exception, *all* Brochures must contain compensation and expense disclosures as to, among other things: (i) whether fees are billed directly to clients or deducted from client accounts; (ii) other fees associated with the provision of advisory services (e.g., custodian fees, mutual fund expenses, brokerage costs); (iii) policies regarding advance payment of fees (and refunds thereof); and (iv) the adviser's acceptance of compensation for the sale of securities or other investment products. Additionally, conflicts of interest associated with all of the foregoing matters, and the manner in which such conflicts are addressed, must be explained.

Item 6. Performance-Based Fees and Side-By-Side Management. In Item 6, the adviser must disclose whether it (or any of its supervised persons) accepts performance-based fees. If an adviser manages both accounts that *are* charged performance-based fees, and accounts that *are not*, that fact must be disclosed, together with an explanation of the associated conflicts of interest and the manner in which such conflicts are addressed.

Item 7. Types of Clients. In Item 7, the adviser must disclose the types of clients

it serves (i.e., individuals, trusts, investment companies, etc.), together with any requirements for opening or maintaining an account (for example, minimum account size).⁹

Item 8. Methods of Analysis, Investment Strategies and Risk of Loss. In Item 8, the adviser must describe the analytical methods and investment strategies used in connection with its management of accounts and the material risks associated therewith. Significant or unusual risks require more detailed discussion. As originally proposed, this item had required risk disclosure only for advisers that primarily employ a particular analytical method or strategy; however, the rule as adopted requires the discussion of risks for each *significant* strategy. An adviser whose primary strategy involves “frequent trading of securities” must explain how that practice can impact investment performance, including the possibility of higher brokerage and other transaction costs, and adverse tax consequences.¹⁰ Advisers that primarily recommend a particular type of security will need to explain the material risks associated with that security. In response to comments, the final rule requires only disclosure of *material* risks, not *all* risks. In addition, in the final release, the SEC eliminated a proposed requirement that the adviser discuss practices with respect to cash balances in client accounts. The SEC did note, however, that an adviser’s fiduciary obligations may, in some cases, require disclosure of cash balance practices, independent of the specific Brochure requirements.

Item 9. Disciplinary Information. In Item 9, the adviser must disclose any legal or disciplinary event that is *material* to a client’s or prospective client’s

evaluation of the advisory business or the integrity of its management. This information is currently required to be disclosed to clients by Rule 206(4)-4 under the Investment Advisers Act of 1940, as amended (the “Advisers Act”).¹¹ The Brochure form offers non-exhaustive lists of (i) criminal/civil actions, (ii) administrative proceedings and (iii) self-regulatory organization proceedings that are presumed to be material. Material events that are not resolved in the adviser’s favor must be disclosed for ten years following the event, unless the event is “so serious” that, even after the passage of ten years, it remains material.¹² Because the SEC has declined to specify the types of disciplinary events that would remain material after ten years, advisers will be required to carefully consider existing pronouncements regarding materiality.¹³

Item 10. Other Financial Industry Activities and Affiliations. Similar to Item 8 under the current Part 2 of Form ADV, Item 10 requires the adviser to (i) disclose any broker-dealer, future commission merchant, commodity pool operator or commodity trading adviser registrations (or pending registrations); (ii) provide a description of any material relationships or arrangements with related financial industry participants; and (iii) disclose associated material conflicts of interest and the manner in which such conflicts are addressed. In addition, advisers that recommend other advisers for their clients, and have payment structures or business relationships with those advisers that may create material conflicts of interest, must describe those practices, the associated conflicts of interest and the manner in which such conflicts are addressed. The proposed rule had contemplated that the disclosure would

encompass *all* conflicts; however, the final rule modified the requirement to cover payments or business relationships giving rise to *material* conflicts.

Item 11. Code of Ethics, Participation or Interest in Client Transactions and Personal Trading. Similar to Item 9 in the current Part 2 of Form ADV, Item 11 requires (i) a brief description of the adviser’s code of ethics; (ii) if the adviser recommends to clients, or buys or sells for their accounts, securities in which the adviser has a material financial interest, a description of the practice, the conflicts presented, and how such conflicts are addressed; and (iii) certain disclosures regarding personal trading including the associated conflicts and how such conflicts are addressed. The final rule modified the proposed rule slightly, by not requiring disclosure regarding securities that are not “reportable securities” under Advisers Act Rule 204A-1(e)(10) (for example, shares in unaffiliated mutual funds) because such securities do not involve significant front-running issues.

Item 12. Brokerage Practices. In Item 12, the adviser must disclose how broker-dealers for client transactions are selected and/or recommended, and how the reasonableness of broker compensation is determined. The required disclosure includes discussions of research and soft dollar benefits, client referrals by brokers, and directed brokerage. Regarding soft dollar benefits, the adviser’s description must be more detailed with respect to products or services outside the Section 28(e) safe harbor.

Item 13. Review of Accounts. Similar to Item 11 in the current Part 2 of Form ADV, in Item 13, the adviser must

disclose whether and the frequency with which client accounts or financial plans are reviewed, the nature of such reviews, and the title(s) of the person(s) conducting the reviews. If accounts are reviewed other than periodically, the factors triggering a review must be described. Finally, the adviser must describe the content of reports provided to clients, and the frequency with which such reports are provided.

Item 14. Client Referrals and Other Compensation. In Item 14, the adviser is required to describe any arrangement pursuant to which the adviser compensates another person for client referrals, together with a description of the compensation. The adviser must also describe any arrangements whereby the adviser receives, from a third party, an economic benefit (including sales awards or other prizes) for providing advisory services to clients. With respect to the receipt of economic benefits from third parties, the associated conflicts of interest must be explained, and the manner in which such conflicts are addressed must be described. The conflict disclosure was not required in the proposed rule, but was added by the SEC in response to a comment.

Item 15. Custody. In Item 15, an adviser that has custody of client funds or securities must explain that clients will receive from the qualified custodian account statements, which should be reviewed carefully. If the adviser also sends account statements to clients, the disclosure must urge clients to compare the two sets of account statements. The Item 15 disclosure is similar to the disclosure mandated under the amended custody rule.¹⁴

Item 16. Investment Discretion. In Item 16, an adviser that accepts discretionary

authority is required to disclose that fact, describe any limitations clients may (or customarily do) place on the authority, and describe the procedures the adviser follows before assuming such authority.

Item 17. Voting Client Securities. Item 17, analogous to Rule 206(4)-6 of the Advisers Act, requires: (i) where the adviser has (or will accept) authority to vote client securities, descriptions of the adviser's voting policies and procedures, whether (and if so, how) clients can direct the adviser's vote, how voting conflicts of the adviser's interest are addressed, and how clients may obtain information from the adviser about securities voted; and (ii) where the adviser does not have authority to vote client securities, disclosure of that fact, an explanation of where clients will receive their proxies/solicitations, and information as to whether (and if so, how) clients can contact the adviser with questions regarding a solicitation. The proposed rule had required detailed disclosure regarding third-party proxy voting services, but the SEC removed this requirement from the final rule, in part because commenters stated that the disclosure "is not relevant for most clients."¹⁵

Item 18. Financial Information. In Item 18, an adviser that requires or solicits prepayment of more than \$1,200 in fees per client, six months or more in advance, must include an audited balance sheet for its most recent fiscal year.¹⁶ This requirement is similar to Item 14 of the current Part 2 of Form ADV, except that the threshold amount has been increased from \$500 to \$1,200 to account for inflation. Additionally, if the adviser has discretionary authority or custody of client funds or securities, or the adviser requires or solicits prepayment of more than \$1,200 in fees

per client, six months or more in advance, then the adviser must disclose any financial condition that is reasonably likely to impair its ability to meet contractual commitments to clients. An adviser that has been the subject of a bankruptcy petition at any time in the past ten years must also provide disclosures relating thereto.

Item 19. Requirements for State-Registered Investment Advisers. Item 19 requires certain disclosures for advisers registered with state securities authorities.

Appendix 1: The Wrap Fee Program Brochure. For an adviser that sponsors wrap fee programs, a separate form is provided under the new rules (designated Part 2A Appendix 1), requiring (as is currently mandated) a separate brochure for wrap fee program clients. Appendix 1 is comparable to Schedule H of the current Part 2 of Form ADV. In addition, advisers must now disclose whether any of their related persons is a portfolio manager in the wrap fee program and discuss associated conflicts of interest.

Delivery and Updating

Initial Delivery. Amended Rule 204-3 provides that an adviser must deliver a current Brochure before or at the time it enters into an advisory contract with a client. Notably, advisers are no longer required to deliver the Brochure to a prospective client at least 48 hours before entering into an advisory contract or grant a five-day cancellation right. In addition, advisers are not required to deliver the Brochure to certain clients receiving only impersonal advice or to clients that are registered investment companies or business development companies. Further, advisers that do not

have any clients to whom a Brochure must be delivered are not required to prepare or file a Brochure. The amended rule does not require advisers to deliver a current Brochure to investors in pooled investment vehicles, although advisers would be well-advised to do so.

Annual Delivery. If there are material changes to the Brochure, advisers are required to provide annual updates of the Brochure to clients within 120 days after the adviser's fiscal year end. This requirement can be met by delivering either (i) a current updated Brochure that includes or is delivered with a summary of material changes (as discussed above), or (ii) a summary of material changes that offers to provide the full current Brochure. This requirement is in stark contrast to the existing rules that require only that the adviser offer to provide the Part 2 of Form ADV to clients on an annual basis. As in the case of initial delivery, the amended rule does not require advisers to deliver a current Brochure to investors in pooled investment vehicles, although advisers would be well-advised to do so.

Interim Delivery. Advisers are required to provide an updated Brochure promptly whenever the Brochure is amended to add a disciplinary event or to change information previously disclosed in Item 9. The updated Brochure must contain a discussion of material information relating to the disciplinary event. The final release is silent as to whether an adviser is required to deliver an updated Brochure upon other material changes. As a result, advisers must undertake such a determination on a case-by-case basis to determine whether amendment and distribution of an updated Brochure is appropriate and advisable.

Electronic Delivery. In all cases, electronic delivery of the Brochure is permissible in accordance with the SEC's interpretive guidance.¹⁷

Updating

Consistent with current requirements, the Brochure must be updated at least annually, and *promptly* in the case of any information in the Brochure that becomes *materially inaccurate* (except that the summary of material changes and the amount of assets under management need only be updated annually).

IARD Filing Requirements

The new Brochure (and any amendments thereto) must be filed electronically through IARD. Brochure supplements (discussed below) need not be filed, but advisers must retain copies of all supplements (and amendments thereto). As to the mechanics of filing, Part 2 of Form ADV will not be completed online, but will instead be prepared as a separate file, converted into text-searchable PDF, and attached to the IARD filing. Brochures will be publicly available through the SEC website.

Brochure Supplements

Part 2B of the new Brochure form provides that the delivery of each Brochure must be accompanied by Brochure supplements ("Supplements"), which offer resume-like information about advisory personnel upon whom the client relies for advice. The Supplements are designed to assist clients in evaluating the adviser and its personnel. Subject to certain exceptions, an adviser must deliver to each client a Supplement for each supervised person who provides advisory services to that client (that is, any supervised person

who formulates investment advice for the client and has direct client contact, as well as any supervised person who has discretionary authority over the client's assets, even in the absence of client contact). Supplements are subject to delivery and updating requirements similar to those applicable to Brochures generally as described above.

Supplements must contain the following information, organized in the prescribed order:

- **Cover Page.** Required information includes the supervised person's name, business address and telephone number (and corresponding information for the advisory firm), as well as the date of the Supplement.
- **Educational Background and Business Experience.** Required information includes age, post-secondary education, and business background for the preceding five years. Provided information may include professional designations with an explanation of minimum qualifications.
- **Disciplinary Information.** Required disclosure includes legal or disciplinary events in which the supervised person was involved that are material to clients. The requirements generally parallel those of Item 9 of the new Brochure form (described above).
- **Other Business Activities.** Among other things, the adviser must disclose: (i) whether each supervised person is actively engaged in an investment-related business or occupation (including broker-dealer registration, broker-dealer representative, futures commission merchant, commodity pool operator and commodity trading advisor); (ii) any relationship between

the adviser and another business, together with any material conflicts of interest; (iii) certain information with respect to commissions, bonuses or other compensation practices; and (iv) any active involvement in any other business or occupation that provides substantial income or involves a substantial amount of time.

- **Additional Compensation.** Required disclosure includes any arrangements with respect to third parties that provide economic benefits to the supervised person for advisory services.
- **Supervision.** Mandates disclosure of how the individual is supervised and monitored, together with contact details of supervisor.

Implications

In order to comply with the new rules, advisers will need to take prompt action to significantly adapt or overhaul their existing Brochures. Aside from simply developing plain English, narrative disclosures as required by the various Brochure items, advisers will need to evaluate the substance and manner of presentation most appropriate for conveying information to investors. While the various disclosure items must be presented in the prescribed order, there will be opportunities to draft documents that maximize efficiency. For example, the rules permit advisers to create and file “separate brochures for different types of advisory clients, each of which may be shorter, clearer, and contain less extraneous information than would a combined brochure,” provided that “each client receives all information about the services and fees that are applicable to that client.”¹⁸ Additionally, advisers offering a more extensive array of services should note that it is permissible to include summary

information at the beginning of their Brochures.¹⁹

Further, because the new Brochures will be publicly available on the SEC website, advisers may want to consider how their business practices, policies and procedures, discussion of fee arrangements and conflicts of interest may be viewed in light of the easily accessible disclosure contained in the Brochures of other advisers (including members of their peer group). Advisers therefore may want to take this opportunity to review their business practices and re-evaluate their compliance policies and procedures in what will amount to a more transparent and more competitive marketplace. We encourage advisers to consult with key members in various business functions throughout the enterprise to ensure that business practices are appropriately disclosed, conflicts of interest properly identified, and policies and procedures to address such conflicts can be implemented and explained in the Brochure. To that end, advisers may find it useful to circulate a preliminary questionnaire to department heads prior to preparing the new Brochure. Additionally, advisers would also be well-advised to review the disclosure in their current offering memoranda to harmonize that disclosure with the proposed disclosure in the Brochure.

What's Next?

The new Brochure rules and forms take effect 60 days after publication in the Federal Register.

- **New Advisers.** Advisers applying for registration with the SEC after January 1, 2011 must file a Brochure (or Brochures) that complies with the new rules, and deliver to clients and prospective clients a Brochure and

Supplements in the manner described above.

- **Registered Advisers.** Registered advisers with a fiscal year end of December 31, 2010 must file a new Brochure in compliance with the new rules no later than March 31, 2011 and deliver to new clients and prospective clients a Brochure and Supplements within 60 days of the filing.

Lowenstein Sandler's Investment Management Regulatory and Compliance Group is available to assist our clients as they consider, prepare for and ultimately comply with the new Brochure requirements discussed in this alert.

We will continue to monitor and report on developments relating to the SEC's new Brochure rules, as well as other legislative, regulatory and industry developments that may be of importance to our clients.

Please contact any of the attorneys below, or any other member of Lowenstein Sandler's Investment Management Group, for further information on the matters discussed herein.

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- ¹ SEC Release No. IA-3060, File No. S7-10-00, is available [here](#). The SEC also amended certain related rules promulgated under the Investment Advisers Act of 1940, as amended.
- ² SEC Release No. IA-2711, File No. S7-10-00, is available [here](#). The 2008 proposed rule and form amendments followed an April 2000 SEC proposal regarding narrative Brochures.
- ³ Mary L. Schapiro, *Speech by SEC Chairman: Opening Statement at the SEC Open Meeting—Form ADV Amendments* (July 21, 2010), available at <http://www.sec.gov/news/speech/2010/spch072110mls-adv.htm>.
- ⁴ *Id.*
- ⁵ SEC Release No. IA-3060, File No. S7-10-00, at 3.
- ⁶ SEC Office of Investor Educ. And Advocacy, *Investor Bulletin: Amendments to Form ADV—New Disclosure Requirements for Investment Advisers* (July 29, 2010), available at <http://www.sec.gov/investor/alerts/bulletin-formadv.htm>.
- ⁷ Advisers may calculate the “assets under management” in a different manner from the Part 1A, Item 5.F calculation, but if they do so, they must retain documentation describing such method. Advisers that hold themselves out as specializing in a certain type of advisory service will be required to explain the nature of that service in greater detail.
- ⁸ SEC Release No. IA-3060, File No. S7-10-10, at 14.
- ⁹ Under the current Brochure rules, information regarding typical clients served is disclosed under Item 2.
- ¹⁰ The SEC acknowledges in the adopting release that, while “frequent trading of securities” is not easily defined, advisers would be required to respond if their strategies involve frequent trading “that a reasonable client would otherwise not expect in light of the other disclosures contained in the brochure.” SEC Release No. IA-3060, File No. S7-10-00, at 21.
- ¹¹ Because of the inclusion of disciplinary information in the Brochure, the SEC is rescinding Rule 206(4)-4, effective as to each adviser on the date by which that adviser must begin delivering its new Brochure. Advisers having clients to whom delivery is not required (certain clients who are recipients of only impersonal investment advice, registered investment companies and business development companies) nonetheless must continue to disclose material disciplinary and legal events (and inability to meet contractual commitments) to all clients under their fiduciary duty of full and fair disclosure. *Id.* at 28.
- ¹² *Id.* at 23.
- ¹³ *Id.* There is an exception to Item 9 disclosure in the event the adviser is able to rebut the materiality presumption, in which case the adviser must prepare and preserve a file memorandum of such determination. *Id.* While the final rule does not require disclosure regarding arbitration awards and claims, the SEC notes in the release that advisers must consider whether arbitration awards and claims should be reported in the Brochure, in the event they reflect on the adviser’s integrity. *Id.* at 25.
- ¹⁴ The Lowenstein Sandler client alert analyzing the amended custody rule is available [here](#).
- ¹⁵ SEC Release No. IA-3060, File No. S7-10-00, at 42-43.
- ¹⁶ An adviser need not respond to Item 18.A if the adviser is also a qualified custodian as defined in Rule 206(4)-2 or similar state rules, or an insurance company. *Id.* at Appendix C, Part 2A of Form ADV: Firm Brochure, Exception to Item 18.A.
- ¹⁷ See SEC Release No. IA-1562, File No. S7-13-96.
- ¹⁸ SEC Release No. IA-3060, File No. S7-10-00, at 10, 10 n.27.
- ¹⁹ *Id.* at 10

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